

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 482 435
Issued to: Frederic A. NIED Z-550-12-8930

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2241

Frederic A. NIED

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 20 December 1978, an Administrative Law Judge of the United States Coast Guard, after a hearing at Long Beach, California, on 29 November 1978, suspended Appellant's documents for a period of three months on nine months' probation, upon finding him guilty of negligence. The single specification of the charge of negligence found proved alleged that Appellant, while serving as pilot aboard M/T LION OF CALIFORNIA, under authority of his captioned documents, did on or about 19 September 1978, at 1759, navigate the vessel in a negligent manner so as to cause an allision between the vessel and M/V GLOMAR EXPLORER in Slip 240, Los Angeles Harbor.

At the hearing Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer offered into evidence, without objection from Appellant, numerous copies of documents. It was stipulated between the parties that Appellant was serving as Pilot on board the LION OF CALIFORNIA at all times material and pertinent to the issue at hand, and that he had given all engine and rudder commands. The Investigating Officer introduced no further evidence.

Appellant, after denial of his motion to dismiss, testified on his own behalf and offered into evidence nine exhibits. It was further stipulated among the parties that the beam of LION OF CALIFORNIA was 68 feet 4 inches; the width of Slip 240 was 300 feet; the length overall of the Tug POINT VICENTE was 105 feet; height of the tide was one half foot above mean low water; and POINT VICENTE'S shaft horsepower was 300 with twin screws and twin rudder. At the conclusion of Appellant's testimony, the testimony of Lionel H. DeSanty, USCG (Retired), and Captain Kurt O. Myers, retired Chief Pilot of the Port of Los Angeles, was introduced. Appellant thereupon rested his case.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and single specification as alleged had been proved. He then entered an order of suspension for a period of three months on probation for nine months.

The decision was served on 29 November 1978. A timely appeal was filed on 15 December 1978 and perfected on 30 April 1979.

FINDINGS OF FACT

On 19 September 1978, Appellant was serving on board M/T LION OF CALIFORNIA in the capacity of Pilot and was serving under the authority of his duly issued license. The LION OF CALIFORNIA is a vessel under permanent enrollment and license with a registered length of 492.9 feet and a registered breadth of 68.3 feet. The vessel's draft at the time of the allision was 29 feet 11 inches forward and 29 feet 4 inches aft. Appellant boarded the vessel at 1723 on 19 September 1978 seaward of Buoy "LA" and the vessel proceeded through Angel's Gate, picking up the tugs POINT VICENTE and LONG BEACH, towards the main ship channel. Prior to boarding the vessel, Appellant had checked the depth from a chart that was prepared by Jacobsen Pilot Service, Appellant's employer, and NOAA chart 18751. However during the maneuvering of the vessel, the Appellant relied on the Jacobsen chart. He further checked the recorded data on the vessel that indicated the vessel was sluggish when deeply laden and that the stern swung to port when the vessel was backing. While proceeding in the channel, in an effort to avoid an outbound Japanese vessel approaching the Marine Exchange, Appellant steered the vessel well to the right of the channel toward Buoy 4. After clearing the vessel, LION OF CALIFORNIA started to turn into the main channel and shortly thereafter approached Berth 240 A. GLOMAR EXPLORER was moored portside to the northeasterly portion of slip 240 restricting maneuvering in the 300' wide slip.

At approximately 1754 Appellant lined up to enter the Slip and ordered slow astern. At that time POINT VICENTE was made fast on the starboard bow with two lines and LONG BEACH was made fast astern with one line through the center line chock. POINT VICENTE was ordered to push against the vessel and LONG BEACH ordered to go ahead with right rudder to counteract the tendency of the ship's bow to swing to starboard and the stern to swing to port. At 1755 half astern was ordered. Immediately before reaching the point where the turn toward the dock was made, LION OF CALIFORNIA started to swing to the right despite the efforts of POINT VICENTE and LONG BEACH. "Full astern" was ordered. At 1756 the vessel's engines were ordered stopped because the backing was causing the stern to swing too much to port. At 1757, Appellant went full astern in an effort to cut the forward way and at 1758 he ordered an emergency

full astern and dropped the port anchor. At 1759 the bow of LION OF CALIFORNIA struck GLOMAR EXPLORER on its starboard side, POINT VICENTE having let go to avoid being caught between the vessels. LION OF CALIFORNIA was aground. The soundings taken subsequent to the allision indicated that the soundings on the Jacobsen Chartlet and on NOAA chart 18751 overstated the amount of water in Slip 240. A Notice to Mariners, issued on 14 March 1979, confirmed the fact that errors appeared in the charted depth and indicated that in fact as little as 27 feet of water existed at the entrance to the Slip.

BASES OF APPEAL

This appeal has been taken from a decision and order of the Administrative Law Judge. It is contended that (I) jurisdiction is lacking; (II) Appellant was denied his constitutional rights to administrative due process in that the specification as charged does not conform to the requirements of 46 CFR 5.05-17 and it does not meet its purpose of apprising the Appellant of the offenses of which he is charged so as to enable him to adequately prepare his defense, (III) the Administrative Law Judge erred in denying Appellant's motion to dismiss at the conclusion of the Government's case, (IV) the Administrative Law Judge erred in finding that Appellant failed to act as a reasonably prudent pilot, and (V) the Administrative Law Judge found the charge and specification proved without evidence (1) establishing a standard of care, (2) that the Appellant breached such standards, and (3) that the breach was the proximate cause of the casualty.

APPEARANCE: Graham and James, 100 Oceangate, Long Beach, California, by Reed M. Williams, Esq.

OPINION

With respect to Argument I, Lack of Jurisdiction, it was established that LION of CALIFORNIA is a coastwise seagoing steam vessel not sailing on register. It was stipulated that Appellant was serving as pilot aboard the vessel at the material time in question. His service was required under R.S. 4401 (46 U.S.C. 364). Accordingly, the finding of jurisdiction is supported by the evidence of record and made with propriety.

As to Argument IV, when a moving vessel allides with a moored vessel a presumption of negligence is created. That presumption shifts the burden of going forward with the evidence to the Appellant.

The Administrative Law Judge's finding of negligence was based on his determination that the Appellant failed to meet the burden

of going forward with the evidence, and "[i]n the process introduced evidence clearly establishing that he relied on inaccurate soundings." The Administrative Law Judge concluded that Captain Nied's reliance on the Jackson chart, in lieu of the NOAA chart, was solely responsible for the allision. I disagree.

LION OF CALIFORNIA entered Slip 240 with insufficient water. Coursing the bottom, the vessel became uncontrollable and sheered into GLOMAR EXPLORER. The sheer would have been the reasonably foreseeable result if the Appellant could have ascertained the lack of water. However, both the NOAA and Jacobsen charts were in error (Notice to Mariners 14 March 1979), and reliance on either chart would have led the Appellant to conclude that sufficient water existed to maneuver the vessel.

To find liability three determinations must be made:

- (1) What was the standard of care required;
- (2) Was the Appellant prudent in the exercise of that standard of care; and
- (3) If not, was the allision the proximate cause of that failure.

The standard of care required of Appellant is as set forth at 46 CFR 5.05-20(2):

"Negligence...[is] defined as the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform."

As to Appellant's prudent exercise of that degree of care, the grounding clearly developed from the reliance on charted soundings presumed to be accurate. Although sufficient water did not exist, Appellant's reliance on the published material was prudent.

Lest counsel be misled in the future, it should be pointed out that the assertion on brief, to the effect that the Government had failed to establish the "essential element" of proximate cause, is without merit. See Commandant's Appeal Decision 1755 (RYAN).

Based on the foregoing I conclude that the Administrative Law Judge erred in his findings. This conclusion renders all other Arguments moot.

ORDER

The order of the Administrative Law Judge, dated at Long Beach, California, on 29 November 1978 is SET ASIDE, his Order is VACATED, and charge is DISMISSED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 2nd day of April 1981.